Supreme Court, U.S.
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No. 97-889

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND ITS LOCAL 1422 AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND ITS LOCAL 1422 AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

This brief *amici curiae* is filed by the American Federal of Labor and Congress of Industrial Organizations, a federation of 78 national and international labor organizations with a total membership of approximately 13 million working men and women, and by the International Longshoremen's Association, and its Local 1422, the exclusive bargaining representatives of the collective bargaining unit in which petitioner Ceasar Wright was employed. The parties to this case have consented to the filing of this brief as provided for in the Rules of the Court.*

SUMMARY OF ARGUMENT

The respondent-employers maintain that Ceasar Wright may not proceed with his Americans with Disabilities Act ("ADA") claim in court, because his exclusive bargaining representative did not take his ADA claim to arbitration under the collective bargaining agreement dispute resolution system covering his bargaining unit.

I. Mr. Wright pursued his statutory claim in court rather than under the collective bargaining agreement's dispute resolution system. One track of that system provides for dispute resolution of certain claims at the behest of an individual employee but is expressly limited to contract disputes and does not result in adjudication by a neutral arbitrator. The agreement also establishes a multi-tiered procedure for settling "matters under dispute" with access to a neutral arbitrator only if the union and the employers deadlock at the final stage. Thus, the employers' preclusion argument is really a contention that

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* No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

Mr. Wright was relegated for final and binding determination of his statutory claims to a system that is largely one of negotiation, not adjudication, and in which access to a neutral decisionmaker is determined by the union.

II. This Court has already decided, in a long line of cases, that an individual employee's right to litigate public law claims in court is not affected by the availability of a collective bargaining agreement dispute resolution system such as the one here. Beginning with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court has made it clear that the requirement that employees resort to collectively-bargained grievance-arbitration systems is not applicable where the employee's claim derives not from the collectively-bargained system of private governance but from public law. Nothing in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), detracted from that basic principle. *Stare decisis* is therefore a full and sufficient basis for reversing the Fourth Circuit's holding in this case precluding the litigation of Ceasar Wright's ADA claim.

III. In particular, this is decidedly not a situation in which the *Gardner-Denver* resolution of the issue in this case can be shown to be fundamentally incorrect, either *ab initio* or as a result of later decisions. The basic premises of *Gilmer* are that where two parties agree in advance that subsequent disputes will be arbitrated rather than litigated, there is no reason not to enforce that promise like any other, since substantive rights are not thereby altered. Collective bargaining agreement union-employer grievance-arbitration systems, in contrast, are a substitute for strikes, not for litigation, and are designed to advance the interests of the bargaining unit as a whole. Arbitrators under labor agreements are expected to make decisions based, in part, on the impact on the ongoing relationship between the employer and the employees as a group, and not on a strictly rights-based model. It follows that the policy favoring such processes has application only to the enforcement of claims invoking the terms, ex-

press and implied, of the collective bargaining agreement itself. The federal statute declaring "desirable" union-employer final dispute resolution systems under collective bargaining agreements expressly so states, and this Court's articulation of the policy favoring binding labor arbitration is also so limited.

Further, this Court's conclusion that individual employees must resort to collectively-bargained dispute resolution systems for the vindication of individual rights declared in the system of private law created by the collective bargaining agreement was derived from the national labor policy, not from contract concepts. And, the Court has expressly recognized, as well as, that exclusive bargaining representatives must have wide discretion with regard to prosecution of employee claims in collectively bargained grievance-arbitration systems if the system is to function effectively.

Collective bargaining agreement dispute resolution systems therefore differ fundamentally in purpose, structure, and potential to compromise substantive rights from the direct, individual agreement enforced in *Gilmer*, and nothing in *Golmer* supports the overruling of *Gardner-Denver* and its progeny.

ARGUMENT

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), this Court held that "a claim under the Age Discrimination in Employment Act of 1967 can be subjected to compulsory arbitration pursuant to an arbitration agreement" in which the claimant "agreed to arbitrate any dispute, claim or controversy" with his employer including those "arising out of [his] employment or termination of employment." In so holding, the *Gilmer* Court recognized the "liberal federal policy favoring arbitration agreements," (*id.* at 25 *quoting Moses H. Cone Memorial Hospital v. Mercury Constitution Corp.*, 460 U.S. 1, 24 (1983)), and stated that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," (500 U.S. at

26 *quoting Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

Ceasar Wright, the employee-petitioner in this case, has *not* made any such agreement to substitute arbitration for litigation of his Americans with Disabilities Act (ADA) claim. And, there is *nothing* in the ADA, in any other employee ADA claim, or for the arbitration of any other public law individual employee rights claim, absent an employee agreement to substitute arbitration for court litigation of the claim.

So far as appears then, the employer-respondents' contention that Mr. Wright must arbitrate his ADA claim, and is barred from litigating his claim in federal court in the manner provided for in the ADA itself, fails on its face.

To avoid that conclusion, the employer-respondents argue: that while there is no Ceasar Wright arbitration agreement, there is a Local 1422, International Longshoremen's Association-South Carolina Stevedores Association collective bargaining agreement; that the collective bargaining agreement provides, *inter alia*, for the arbitration of "matters under dispute . . . between the Local and [an] individual Employer;" that Mr. Wright is an employee in the collective bargaining unit covered by the collective agreement; that Local 1422 is the exclusive bargaining representative of that bargaining unit; and that the collective agreement's arbitration clause should therefore be read both to cover public law individual employee rights claims, such as ADA claims, and to be a binding agreement between Mr. Wright and the Steveodres Association to substitute arbitration of Mr. Wright's ADA claim for court litigation of that claim.

In the argument that follows we show that collective bargaining agreements such as this one and their provision for arbitration of union-employer disputes cannot be transmuted into employee-employer agreements to arbitrate public law individual employee rights claims.

I. LIKE COLLECTIVE BARGAINING AGREEMENTS GENERALLY, THE AGREEMENT IN THIS CASE PROVIDES FOR A GRIEVANCE-ARBITRATION SYSTEM THAT EMPHASIZES NEGOTIATION OVER ADJUDICATION AND THAT PROVIDES THAT THE PARTIES TO THE COLLECTIVE BARGAINING AGREEMENT, THE UNION AND THE EMPLOYER, ARE THE PARTICIPANTS IN THE PROCESS.

To set the legal arguments that follow in perspective, it is useful to begin by focusing on the genesis of the current case, and on the provisions of the collectively-negotiated grievance-arbitration provisions in particular. As that consideration shows, the collective bargaining agreement establishes a process for extremely expedited consideration by the union and the employers, the parties who negotiated that agreement, of the disputes that arise daily on the docks and for arbitration only in certain circumstances, and then only if the union and employer representatives cannot come to an agreed upon solution. Thus, while the employer-respondents argue that Ceasar Wright should have arbitrated, rather than litigated his ADA claim, under the collective bargaining agreement Mr. Wright had *no* right to take his claim to arbitration.

1. Ceasar Wright, a longshoreman, first brought a claim under the Longshore and Harbor Workers' Compensation Act for disability benefits when he was injured at work. Pet. App. 3a. Three years after that claim was settled, Mr. Wright sought to return to work, and the hiring hall run by Local 1422 referred him fo employment. *Id.* After initially accepting the referrals of Mr. Wright for a period of approximately two weeks, the employer-respondents refused to employ Mr. Wright because of his prior disability and took the position that the collective bargaining agreement recognized their right to do so. *Id.* In response, Mr. Wright "initially followed the proper procedure under the collective bargaining agreement for filing a grievance against [the employers]." Pet. App. 16a.

Local 1422 wrote to the employer-respondents, denying that the contract granted the employers any right to re-

fuse employment to Ceasar Wright and asserting in addition that, even "[i]f Ceasar Wright is proven to have limited disability," the ADA protects his right to return to work, so long as he "can perform his duties." Fourth Cir. App. 258. Local 1422 did not, however, pursue the matter of Mr. Wright's reemployment further. Instead, reflecting its understanding that there was no barrier to doing so, Local 1422 advised Mr. Wright to pursue his statutory claim through the normal administrative and judicial channels. Pet. App. 3a.

Ceasar Wright did in fact then pursue the matter, filing suit under the ADA against six stevedoring companies and their multiemployer association, the South Carolina Stevedores Association. The defendants (the employer-respondents in this Court), in response, raised as an affirmative defense Mr. Wright's "fail[ure] to exhaust the adequate remedies and procedures afforded him under the collective bargaining agreement between Local 1422 and SCSA, . . ., as well as the remedies provided under the Longshore Seniority Plan." Jt. App. 30a. And, when Mr. Wright offered to arbitrate the ADA dispute at that juncture, the employers insisted that while Mr. Wright could have taken his grievance to the Charleston Longshore Seniority Board under the Longshore Seniority Plan, or Local 1422 could have taken a grievance to arbitration under Section 15(B) of the collective bargaining agreement, the time limits for both had run (although the ADA lawsuit itself was timely). Fourth Cir. App. 264.

2. The first of the two union-employer dispute resolution schemes that the employer-respondents maintain should have been exhausted, the Seniority Plan, does provide for "resolution of a 'dispute or grievance' brought by an individual employee.'" Jt. App. 49a.[1] But that Plan *does not provide for arbitration at all.* Rather, a "dispute

[1] We stress that we refer to these provisions of the collective bargaining agreement in response to the employer-respondents' invocation of the provisions and are not agreeing with the employers as to the applicability of any particular provision to Mr. Wright's circumstances.

or grievance" may be submitted to a "Seniority Board" composed of two union representatives and two employer representatives, and, if the Board deadlocks, to a two person committee, composed of one individual chosen by Local 1422 and one by the Stevedores Association, "for final determination," *with no provision for breaking a deadlock between the two. Id.* at 48a. The Seniority Plan procedure, then, is *not* a procedure for the resolution of claims by a neutral arbitrator. Nor is it a system for the resolution of claims based on public law individual employee rights. The Seniority Board is restricted to resolving a "dispute concerning or arising out of the terms and/or conditions of the Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation." *Id.*

The second, more general, union-employer dispute resolution procedure invoked by the employer-respondents is set out in Section 15(B) of the collective bargaining agreement. Jt. App. 43a-45a. That provision begins by stating that "[m]atters under dispute which cannot be promptly settled between the Local and the individual Employer shall, not later than 48 hours after such discussion, be referred" to a Port Grievance Committee, composed *of* two union representatives and two employer representatives. *Id.* at 43a. If that committee does not reach a majority resolution within five days, then the dispute is referred to the "Joint Negotiating Committee," functioning as a "District Grievance Committee," again composed of employer and union representatives, this time from ports other than the one in which the dispute originated; committee members from the originating port "may participate in the discussions but may not vote." *Id.*, at 43a-44a. "A majority decision of this Committee" is "final and binding on both parties [to the dispute] and on all Employers signing th[e] Agreement." *Id.* at 44a. "In the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case,"

the Committee is directed by the Agreement to "employ a professional arbitrator." *Id.*

In sum, only *after* the Port Grievance Committee "cannot reach an agreement" and the District Grievance Committee is "unable to reach a majority decision" is a "matter[] under dispute" submitted to a "professional arbitrator." Jt. App. 44a. In that event, Section 15(B) admonishes that in selecting an arbitrator, "thought will be given to a person who is knowledgeable and familiar with the problems of the Longshore industry." *Id.* And, Section 15 also provides that "[a]ll interpretations of this Agreement will be made in accordance with" the contractual procedure, and that "[a]nything not contained in this Agreement shall not be construed as being part of this Agreement." *Id.* at 45a-46a §§ 15(E) & 15(F).[2]

Under the Section 15(B) procedure, then, the processing of a grievance is controlled from start to finish by Local 1422, not by the individual grievant. Further, the process is on its face as much one of negotation as of adjudication, with the union committee representatives having

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[2] In support of its assertion that "[t]he arbitration clause at issue is particulary broad," the court of appeals quotes a portion of Section 15(F) describing the scope of the entire collective bargaining agreement. Pet. App. 4a. However, the arbitration clause is contained in Section 15(B), Jt. App. 43a-44a, and *not* in Section 15(F), *id.* at 44a-45a. Section 15(F) is an integration or "zipper" clause, and its function is to "close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations." *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 879 (9th Cir. 1978).

The district court, by contrast, relied upon Section 17—which states "the intention and purpose of all parties—that no provision or part of th[e] Agreement shall be violative of any Federal or State Law," Jt. App. 47a, in concluding that the "[p]laintiff and his union, through the collective bargaining agreement, were obligated to submit ADA and other claims to the grievance procedure." Pet. App. 17a. Section 17, however, is a "savings" clause, which merely provides that the parties do not intend their agreement to violate the public laws. This is a qualitatively different and far narrower undertaking than providing a private enforcement mechanism for the public laws.

the authority, after discussion, to compromise a grievance by agreeing with management representatives concerning its resolution. And, the time limits imposed are exceedingly short—a matter of days—indicating that the need to come to a quick resolution was of utmost importance to the contracting parties.

3. The employer-respondents' arguments in this case have proceeded in full awareness of the nature of the grievance-arbitration systems set out in the collective bargaining agreement. Thus, in opposing a motion by Caesar Wright to compel arbitration, the employers maintained that Mr. Wright was bound by Local 1422's decision not to prosecute a grievance regarding his ADA rights under Section 15(B), arguing that Mr. Wright's "membership in a collective bargaining unit subjects him to the possibility that his grievance might not be deemed worthy of pursuit to arbitration" and that "union . . . conduct evincing an abandonment of the grievance[] has the same finality as an arbitration award adverse to the grievant." D.S.C. Dk. No. 39, Defs. Mem. in Opp. 5-6. The employers added that "the union is not required to provide notice to, or obtain the consent of, the grievant in order to abandon the grievance," *id.* at 5, and that the individual's "interest in having his grievance arbitrated cannot override the interest of his fellow Longshoremen to expend their dues money in other ways," because "this is the essence of collective representation." *Id.* at 7. Finally, the defendants recognized that Mr. Wright "is not a party to the collective bargaining agreement," and, on that basis, stated that Mr. Wright was "unable to bring a motion (or a suit) to compel arbitration in the absence of a claim of union misconduct or unfair representation by the union." *Id.* at 4.

II. THIS COURT HAS ALREADY DECIDED THAT AN INDIVIDUAL EMPLOYEE'S VINDICATION OF PUBLIC LAW INDIVIDUAL EMPLOYEE RIGHTS IN COURT IS NOT AFFECTED BY ANY COLLECTIVELY-BARGAINED EMPLOYER-UNION GRIEVANCE-ARBITRATION PROCESS COVERING THE EMPLOYEE'S BARGAINING UNIT.

Collective bargaining dispute resolution provisions, such as those summarized above, are designed for, and are well-adapted to, the settlement between the parties to a collective bargaining agreement—i.e., between the *union* and the *employer*—of issues concerning that agreement. The question presented in this case of the effect of that process on the access of bargaining-unit employee-claimants to a judicial forum is one to which this Court has devoted the most mature attention over a prolonged period and on which the Court has arrived at well-settled, solidly-grounded conclusions.

The question here, as the Court has recognized, is generated by Congress' two-fold response to a single economic dilemma. The dilemma, described by Chief Justice Taft at the beginning of modern labor law, is that

> A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. [*American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 (1921).]

And, Congress has addressed the dilemma not through a unitary labor policy but through "two aspects of national labor policy", which are in some instances—but not, as we will develop, in this instance—"in tension." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 (1981):

> The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights.

For reasons we survey in detail below, in interpreting and applying the "collective bargaining process" law, this Court has recognized and applied a very strong presumption that workplace disputes arising under a collective bargaining agreement are subject to the dispute resolution system, if any, devised and administered by the parties to that relationship. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960); *see also, e.g., Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *Allis-Chalmers v. Lueck*, 471 U.S. 220 (1985); *Paperworkers v. Misco*, 484 U.S. 29, 37-39 (1987). And, as a matter of policy derived from the labor laws governing the collective bargaining regime, this Court has also spelled out an obligation of individual bargaining unit employees—not themselves parties to the collective bargaining agreement—to proceed through, and be bound by, the collectively-bargained union-employer dispute resolution system, rather than through employee-initiated court litigation, as a means of vindicating rights derived from the collective agreement's "system of private law" (*Warrior & Gulf Nav. Co.*, 363 U.S. at 581). *See, e.g., Republic Steel v. Maddox*, 379 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Airline Pilots v. O'Neill*, 499 U.S. 65 (1991).

At the same time, this Court has held emphatically and consistently that the set of principles governing the obligation of employees to proceed through the collectively-bargained grievance-arbitration system simply has *no* application where the employee's claim derives not from the collectively bargained "system of industrial self-government," (*Warrior & Gulf Nav. Co.*, 363 U.S. at 580), but from the "statutes governing relationships between employers and their individual employees, [which] guarantee covered employees specific substantive rights" (*Barrentine*, 450 U.S. at 734). The Court has so held in a

series of cases stemming from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and arising under a variety of different statutes and in a variety of procedural circumstances. *See, e.g., Gardner-Denver, supra* (employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is not affected by availability of a collectively-bargained union-employer grievance-arbitration system to challenge the same employer action); *Barrentine, supra* (same, with respect to causes of action under the Fair Labor Standards Act and elaborating on *Gardner-Denver's* rationale); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (same, with respect to causes of action under 42 U.S.C. § 1983); *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213 n.8 (1985), and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412-13 (1988) (same, with respect to state law individual employee rights causes of action); *cf. Atchison, Topeka, & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 565 (1987), and *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) (applying similar principles under the Railway Labor Act to hold that individual employees need not utilize the statutory arbitration system created by the RLA to vindicate either federal or state public law individual employee-rights causes of action).

The essential premise of all of these cases is that the collective bargaining process through which Congress determined the exclusive bargaining representative of an employee group would develop and enforce fair working conditions in the absence of governmentally-imposed norms is *not* appropriate to, and was *not* intended to apply to, the increasingly broad range of federal and state public law norms that set minimum working protections for all employees, whether covered by collective bargaining agreements or not. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Livadas v. Bradshaw*, 512 U.S. 107 (1993) (all holding that state court causes of action for enforcement of governmentally-

required minimum working protections are in no way inconsistent with the collective bargaining process established by the National Labor Relations Act).

The Fourth Circuit—alone of the federal courts of appeals that have addressed the question—has taken the view that this Court in the *Gilmer* decision washed away the foundations of the Court's established *Gardner-Denver* jurisprudence. *Gilmer*, of course, did *not* arise in a collective bargaining agreement setting. And, *Gilmer* simply holds that an individual employee who *herself* agrees to arbitration by a neutral arbitrator, in lieu of court litigation, of any dispute regarding her employment that may arise, is as bound by that promise as any other person who commits in advance to arbitrate a dispute involving interstate commerce.[3] In that regard, *Gilmer* rested on a series of commercial arbitration cases holding that when a person or entity promises another person or entity to arbitrate rather than litigate any dispute that may arise between them, statutory claims are not excepted from that general promise. 500 U.S. at 26, *citing Mitsubishi Motors Corp., supra*; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 40 U.S. 477 (1989).

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[3] In *Gilmer*, the arbitration promise was contained in an agreement between the employee and securities exchanges, not in the employee's employment agreement, and was held enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* Because the arbitration agreement in that case was contained in a separate agreement between the plaintiff and the securities exchanges, *Gilmer* left open the question whether the exception to the FAA § 1 for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies to all or only some contracts of employment. 500 U.S. at 25 n.2. It is of note that Ceasar Wright's employment as a longshoreman *is* certainly within the FAA exclusion. Consequently, had Mr. Wright not worked under a collective bargaining agreement, it is far from clear that the *Gilmer* holding enforcing a prospective agreement to arbitrate employment discrimination, or other public individual employee right, causes of action would have been applicable.

Despite these critical differences, and even though, as this Court later noted, "*Gilmer* emphasized its basic consistency with [the] unanimous decision in *Alexander v. Garner-Denver Co.*," (*Livadas v. Bradshaw*, 512 U.S. at 127, n.21, *see Gilmer*, 500 U.S. at 33-35 (discussing at some length the reasons for that basic consistency)), the employer-respondents in this case maintain that the Fourth Circuit correctly precluded Ceasar Wright from bringing his ADA case in federal court by reason of the union-employer grievance-arbitration provisions of the collective bargaining agreement here.

Considerations of *stare decisis* are alone sufficient basis to reject the contention that the entire *Gardner-Denver* line of cases should be abandoned and that in *Gardner-Denver*'s place a presumption should be erected that collective bargaining agreement union-employer dispute resolution systems preclude individual employees from pursuing their claims based on a public law individual employee statutory right through the judicial remedial scheme stated in the applicable statute.[4]

The issues here are statutory and Congress has never evidenced an intent to alter the well-settled principle that individual employee rights are not subject to collective-bargained union-employer dispute resolution systems.[5] *See*

[4] The employer-respondents in this case make what is in essence a preclusion—or, perhaps, a choice of remedies—contention. That contention was definitively rejected in *Gardner-Denver*. It is worth noting, however, that this Court's precedents go further and reject a "prior exhaustion" contention, permitting some form of court litigation after exhaustion and do so without regard to whether the collective bargaining arbitration actually reaches, or has the authority to reach, the statutory cause of action on its merits. *Barrentine*, 450 U.S. at 731 n.4, 732 n.6 (court litigation not precluded even if the statutory claim was submitted to the collective bargaining agreement procedure, nor is an employee who does not submit his claim to the collective bargaining agreement procedure at all barred from bringing his statutory suit in court.)

[5] Both the ADA and the 1991 Civil Rights Act, amending Title VII of the Civil Rights Act of 1964, do contain identical sections providing that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . .

Patterson v. McClean Credit Union, 491 U.S. 164, 172-73 (1989); *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1981); *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267 (1994); *Hubbard v. United States*, 514 U.S. 65 (1995). Nor has that basic principle generated any practical difficulties of note. *Patterson*, 491 U.S. at 173-174.

To the contrary, that principle has become so embedded in this Court's jurisprudence that altering it would require reconsideration of a number of related questions, including whether statutory limitations periods should be adjusted to permit attempted exhaustion of collectively-bargained procedures (*International Union of Electrical Workers v. Robbins & Mayers*, 429 U.S. 229 (1976)) and whether state law causes of action that are independent of the terms of a collective bargaining agreement are preempted under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (*Lingle*, 486 U.S. at 411 (finding no §301 preemption because "the need to preserve the effectiveness of arbitration" is satisfied as long as "the interpretation of collective bargaining agreements remains firmly in the arbitral realm.")). To foment such widespread instability in well-established law regarding employment relations would create new practical difficulties for employers, employees, and unions seeking to structure their complex relationships with each other.

Most importantly for *stare decisis* purposes, this is decidedly not a situation in which the *Gardner-Denver* line

arbitration, is encouraged . . ." 42 U.S.C. § 12212 (ADA); Pub. L. No. 102-66, § 118, 105 Stat. 1071, 1081. These vague provisions do not, however, specify whether it *is* "appropriate" or "authorized by law" to require use of collective bargaining agreement grievance-arbitration procedures to adjudicate ADA or Title VII rights. And, the legislative history of both provisions states that the intent was to *preserve*, not displace, this Court's decision in *Gardner-Denver* that it is not "appropriate" to mandate arbitration of Title VII and ADA rights under collective bargaining agreement grievance-arbitration provisions. H.R. Rep. No. 485, 101st Cong., 2nd Sess. (1990), at 76-77 (ADA); H.R. Rep. No. 40, 102nd Cong., 2nd Sess. (1991) at 97 (1991 Civil Rights Act).

of cases is "seriously flawed" (*Hubbard v. United States*, 702 U.S. at 514), or in which there is an "intervening development of the law . . . [which] ha[s] removed or weakened the conceptual underpinnings from the prior decision[s]" (*Patterson*, 491 U.S. at 173). For, as we show in the remainder of this brief, the *Gardner-Denver* precedents are based on a sound understanding of the nature of the collective bargaining system and the role of collectively-bargained union-employer dispute resolution processes in that system, an understanding in no way in tension with *Gilmer* and its predecessor cases enforcing a direct prior arbitration promise by a putitive plaintiff in a court case.

III. THE REQUIREMENT THAT INDIVIDUAL EMPLOYEES UTILIZE COLLECTIVELY-BARGAINED UNION-EMPLOYER GRIEVANCE-ARBITRATION PROCEDURES WHERE THERE IS A CLAIMED VIOLATION OF RIGHTS CREATED BY THE COLLECTIVE BARGAINING AGREEMENT IS ONE BASED ON A COMPLEX OF LABOR LAW POLICY PRINCIPLES THAT HAVE NO APPLICATION TO PUBLIC LAW INDIVIDUAL EMPLOYEE RIGHTS, AND NO RESEMBLANCE TO THE CONTRACT-BASED *GILMER* ARBITRATION REQUIREMENT PRINCIPLE.

A *Gilmer* arbitration promise is a simple promise to substitute arbitration for litigation. The arbitration proceeding is akin to a court proceeding, with a neutral arbitrator performing adjudicatory functions essentially like those performed by a judge. Agreement to this type of alternate dispute resolution method does not, therefore, inherently limit or alter the essential nature of the rights committed to the arbitration forum—claims concerning those rights will be adjudicated on the claiming party's initiative by a neutral, uninvolved decisionmaker and, if found valid, will be enforced. *Gilmer*, 500 U.S. at 26, quoting *Mitsubishi, supra*, (" '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to resolution in an arbitral, rather than a judicial, forum.")

Collectively-bargained union-employer grievance-arbitration systems, in contrast, are a "substitute for industrial strife," *not* a "substitute for litigation." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). And, precisely because that is so, just as a strike over an employment dispute is a *collective action of the employee group through their union*, so too is the grieving and arbitrating of an employment dispute through the collective bargaining agreement dispute settlement process. The union acting, for and on behalf of, the entire bargaining unit controls the prosecution of the claim and determines whether the claim is to be pressed to arbitration or settled either in its own terms or through a process of negotiation involving kindred pending claims or putative claims. And, throughout the process the union proceeds by taking into account the employee group's entire working situation. In all these regards the collective bargaining agreement dispute resolution system is well-suited to its purpose as a means of effectuating the employee group's collective rights in a peaceful way rather than through industrial strife. By the same token such systems are not aimed at and are not well-suited to the very different task of substituting for court litigation of public law individual employee rights claims. Thus, to read a collectively bargained union-employer dispute resolution provision as a *Gilmer* arbitration agreement for and on behalf of every bargaining unit employee covering the employees' public law individual employee rights claims is to distort the collectively bargained provision beyond all recognition.

(1) In the absence of any broad governmental response to the dilemma Chief Justice Taft outlined in *American Steel Foundaries, supra*, the initial corrective response was concerted activity:

> [L]abor organizations . . . were organized out of the necessities of the situation. . . . Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. [257 U.S. at 209.]

The "terms" which were thus induced evolved into the modern collective bargaining agreement, enforceable under federal law in order "to promote industrial stabilization." *Warrior & Gulf Nav. Co.*, 363 U.S. at 578. And, because the parties to that agreement—the union and the employer—are by force of circumstances and of law involved in a continuing, complex relationship, their agreements "cover[] the whole employment relationship" and "call[] into being a new common law—the common law of a particular industry or a particular plant" as the means of "erect[ing] a system of industrial self-government." *Id.* at 579-580; *see also Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy . . . is . . . to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife"); *Local 174, Teamsters v. Lucas Flour*, 369 U.S. 95, 105 (1962).

The collectively-bargained grievance-arbitration system, in its turn, is "[a] major factor in achieving industrial peace," because it provides a means of peaceably administering the self-governmental system created by the collective bargaining agreement rather than "leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given time, of the contending forces." *Warrior & Gulf Nav. Co.*, 363 U.S. at 580. Thus, "arbitration of labor disputes under collective bargaining agreements" is "part and parcel of the collective bargaining process itself." *Id.* at 578. "The processing of disputes through the grievance machinery"—of which arbitration is a part—"is actually a vehicle by which meaning and content are given to the collective bargaining agreement . . . [as] a part of the continuous collective bargaining process." *Id.* at 581.

As such, arbitration in the labor context is both a method of enforcing pre-established rights and "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally

accord with the variant needs and desires of the parties." *Warrior & Gulf Nav. Co.*, 363 U.S. at 581; *see also, e.g., Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 378; *Paperworkers v. Misco*, 484 U.S. at 38. And, given the nature of the process, the rights-enforcing and private-lawmaking functions are often intertwined in even the most mundane grievances.

All that being so, "[t]he labor arbitrator performs functions which are not normal to the courts," and "the considerations which help him fashion judgments may indeed be foreign to the competence of courts." *Warrior & Gulf Nav. Co.*, 363 U.S. at 581. The arbitrator's resolution of the dispute is expected to "reflect not only what the contract says but . . . such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." *Id.* at 582. For that reason, an important consideration in the arbitrator's selection will often be his familiarity with "the practices of the industry and the shop." *Id. See* Jet. App. 44a.

In all these respects, of course, a collective bargaining agreement arbitrator has everything to do with proper effective of the agreement's "system of private law" (*Warrior & Gulf Nav. Co.*, 363 U.S. at 581) and nothing to do with the adjudication of public law individual employee rights.

(2) The above analysis indicates that the policy of the federal labor laws favoring enforcement of collectively-bargained union-employer grievance-arbitration provisions is predicated upon the need to foster flexible administration of contractually-created norms by the parties to the collective bargaining relationship, *i.e.*, by the union and the employer. It follows that this policy is limited to the enforcement of such rights, express and implied. And indeed, the statutory articulation of that policy, § 203(d) of the Labor Management Relations Act, 29 U.S.C.

§ 173(d), expressly so indicates, declaring that the "[f]inal adjustment by a method agreed upon by the parties is . . . desirable" with respect to, and only with respect to, "settlement of grievance disputes *arising over the application or interpretation of an existing collective bargaining agreement*" (emphasis supplied).

As far as we are aware, *every* articulation by this Court of the presumption favoring arbitration under collective bargaining agreements has, consistently with the industrial strife roots of that presumption and with § 203(d), been limited to issues involving the elucidation of the collectively-negotiated, private law agreement. *See, e.g., Warrior & Gulf, Nav. Co. supra; Steelworkers v. Enterprise Wheel & Carriage Corp.*, 363 U.S. 593, 597 (1960) ("an arbitrator is confined to the interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice"); *Paperworkers v. Misco*, 484 U.S. at 36 (emphasis supplied) ("[c]ollective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, . . . the courts play only a limited role when asked to review the decision of an arbitrator.") *AT&T Tech. Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) ("This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, 'furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.' "); *Nolde Brothers Inc. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 253 (1977); *Litton Financial Printing v. NLRB*, 501 U.S. 190, 206 (1991).

Against this background, it is not surprising that this Court's cases articulating the reach of broadly-stated collective bargaining agreement arbitration provisions read those clauses as providing for the arbitration of any aspect

of the "common law of the shop" but *not* for the arbitration of issues entirely outside the private system of governance established by the agreement.

In *Warrior & Gulf Nav. Co.*, for example, the grievance-arbitration clause covered "differences . . . as to the meaning and application of the provisions of this Agreement, or . . . *any local trouble of any kind*." 363 U.S. at 576. The Court, as we have seen, viewed this agreement as "a substitute for industrial strife," not litigation (*id.* at 578), and in its extended discussion of the arbitrator's authority remained focused on the authority to elaborate "the industrial common law—the practices of the industry and the shop—[as] . . . part of the collective bargaining agreement although not expressed in it," (*id.* at 582), and the Court never suggested that the determination of external law questions is within a labor arbitrator's ordinary functions. *See also Gateway Coal, supra*, 414 U.S. at 375, 377-78 (arbitration provision covering disputes "as to the meaning and application of the provisions of this agreement . . .[,]matters not specifically mentioned in this agreement . . . [and] any local trouble of any kind" is meant to assure access to arbitration for "unforeseen disagreements that inevitably arise . . . [in which] the labor arbitrator has resort to considerations foreign to the courts"); *Barrentine*, 450 U.S. at 736, 737 (collective bargaining agreement providing that " 'any controversy' between the parties . . . be resolved through the binding contractual grievance procedures" does *not* give rise to a presumption favoring binding arbitration of individual rights arising out of a statute; "[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.").

Most recently, in *Hawaiian Airlines, Inc. v. Norris, supra*, the Court construed the RLA statutory provision

for the arbitration of disputes that "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (45 U.S.C. § 151a), and held that "grievances" does not, in the industrial relations context, connote "disputes . . . based on statutory or common law," but only "disagreements over how to give effect to the bargained-for agreement," including implied terms of the agreement. 512 U.S. at 253-254; *see also id.* at 254 ("The use of 'grievance' to refer to a claim arising out of a [collective bargaining agreement] is common in the labor law context in general," citing *Paperworkers v. Misco, supra*).

In short, this Court has consistently read broad but general language delineating the scope of collective bargaining agreement union-employer grievance-arbitration provisions with the presumption that the intent is to cover all disputes arising out of the private law system established by the parties to the agreement and has not understood such general language as encompassing an intent fundamentally to alter the basic office of such provisions where the alternative to arbitration is not industrial strife but court litigation. That understanding could not be more right.

(3) To be sure, the employer-respondents in this case do seek to overcome the lack of a Ceasar Wright arbitration agreement through the Local 1422-Stevedore Association grievance-arbitration agreement. And, in this regard, the employers point to the *Republic Steel v. Maddox*, 379 U.S. 650, (1965), rule that bargaining unit employees asserting a right under a collective bargaining agreement containing such a grievance-arbitration provision must proceed by filing a grievance and following the contractual dispute settlement system and may not proceed by filing and prosecuting an individual contract action in court.

But *Maddox* recognizes that the bargaining unit employees are *not* parties to the union-employer arbitration agreement in the same way that Mr. Gilmer was party to

an arbitration agreement and that the effect of the collectively bargained union-employer arbitration provision on the employees' right to bring a suit in court is therefore *not* a simple contract law question of the kind presented by a direct individual arbitration agreement. Rather, the *Maddox* rule was derived by the Court from the "national labor policy" in elucidating the scope and limits of the majoritarian regime established by the federal labor laws. The principles governing when an individual employee is required to invoke the collectively bargained union-employer grievance-arbitration system, and when he or she is not, were also developed by this Court, in full recognition that the task is *not* one of applying contract law principles but of reconciling the various strands of the national labor policy. And, those principles, which emphasize the necessity of majoritarian control over the collective bargaining agreement's dispute resolution procedure, mandate the conclusion that such union-employer arbitration provisions do not impinge on the right of employees to bring their individual public law employee right claims to court.

As the statutory exclusive bargaining representative, the Union was chosen by the majority of employees and imbued by the NLRA with authority to enter into a collective bargaining agreement establishing the basic private governance system covering the wages, hours, and terms and conditions of employment of unit employees. 29 U.S.C. §§ 158(a)(5), 158(d), & 159(a). And, to a large but not unlimited degree, national labor policy binds the represented employees to the decisions reached by their exclusive representative in negotiating and administering such collective agreements.

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees . . . have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order

> his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances. [*NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967).]

Initially, the Court concluded that "federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel v. Maddox*, 379 U.S. at 652. In so doing, the Court emphasized that a "Maddox" suit is "*simply on the contract.*" *Id.* at 657 (emphasis supplied). That the holding in *Maddox* is limited to cases concerning rights created by the system of private law erected by the parties to the collective agreement is clear not only from that emphasis and from the use of the term "grievance," but from the reasons the Court gave for requiring individual employees to attempt to use the contractual procedure.

Those reasons, the Court initially explained, were that:

> Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d). . . . Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. . . . A contrary rule would . . . "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." [*Maddox*, 379 U.S. at 653.]

And the Court later expanded on the rationale for the *Maddox* exhaustion rule in *Vaca v. Sipes*, 386 U.S. 171 (1967):

> *Since the employee's claim is based upon breach of the collective bargaining agreement*, he is bound

> by the terms of that agreement which govern the manner in which contractual rights may be enforced. *For this reason*, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650. [386 U.S. at 184-185 (emphasis supplied).]

To put this observation another way, *Vaca* recognizes that the substantive rights created by the collective agreement and the union-employer grievance-arbitration provisions of the collective agreement addressed to enforcing those rights are two parts of an indivisible *contractual* whole, so that requiring employee resort to the grievance-arbitration system does not alter the individual employee's contract-derived rights. That understanding of the *Maddox* rule, like the understandings stated in *Maddox* itself, has force only with respect to employee rights derived from the express and implied terms of the collective agreement itself.

In short, the reasons for requiring individual employees to utilize collective bargaining agreement grievance-arbitration procedures are *not* grounded, as in *Gilmer*, in the traditional contract principle that " 'having made the bargain to arbitrate, the party should be held to it . . . ." 500 U.S. at 26, *quoting Mitsubishi*, 473 U.S. at 628. Rather, the national labor policy concerns that underlie the *Maddox* rule pertain to the scope of union representation and the nature of the collective bargaining agreement. As such, the *Maddox* requirement that individual employees are bound by those procedures applies *only* where the employee's right derives from collective representation and the collective agreement.

The *Maddox* rule cannot be stretched to cover individual public law employee rights claims for a second closely related reason. As we have emphasized a union-employer grievance-arbitration agreement provision, in contrast to an individual employee *Gilmer* arbitration agreement, both substitutes one forum for another *and* grants the union,

as opposed to any individual employee, *control* over the prosecution and settlement of the claim.

That is the case, this Court has stressed, for compelling reasons related to the proper development of the "common law of the shop" under the collective bargaining agreement and to the role union-employee grievance-arbitration systems play in that development by enforcing and elaborating on those agreements so as to promote and stabilize the on-going collective bargaining relationship.

Vaca v. Sipes explains at some length the virtues of a "grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration":

> Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956). [386 U.S. at 191.]

In contrast,

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration.[6] This

[6] *Vaca* noted that "[u]nder current grievance practices, an attempt is usually made to keep the number of arbitrated grievances to a minimum," and cited statistics showing that in some plants less than one percent of the grievances filed were taken to arbitration. 386 U.S. at 192 n.15.

> would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. [*Id.* at 191-92, citations omitted.]

The *Vaca* Court went on to stress that a rule permitting individual access to union-employer grievance-arbitration procedures could endanger future negotiation of "detailed grievance and arbitration procedures of the kind *encouraged by LMRA § 203(d)* . . . if the [] power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration." 386 U.S. at 192 (emphasis supplied). *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979) ("[U]nion discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous complaints, and strengthens the employee's confidence in the union . . . Without these screening and settlement procedures . . . the costs of private dispute resolution could ultimately render the system impracticable").

The Court in *Vaca* and other cases did recognize that "because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory for the individual grievant." 386 U.S. at 185. But, to preserve the virtues of union-controlled access to the grievance-arbitration process, *Vaca* held that employees may bypass the contractual procedures with regard to a "claim . . . based upon breach of the collective bargaining agreement" (*id.* at 184) only if "the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievances" (*id.* at 186). And, in elucidating the scope of that duty, this Court has preserved a

wide breadth of discretion for unions in handling employees' contractual grievances:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees . . . The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose . . . [*Humphrey v. Moore*, 375 U.S. 335, 349 (1964); *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).]

The union's discretion goes beyond the authority "to sift out wholly frivolous grievances which would only clog the process," so as to leave the union "free to take a position on the not so frivolous disputes" or when "the issue is chiefly between two sets of employees." *Humphrey*, 375 U.S. at 349. For "[t]o remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Id.* at 350. *See also Air Line Pilots v. O'Neill*, 499 U.S. at 78 ("[a]ny substantive examination of the union's performance . . . must be highly deferential, recogniizng the wide latitude . . . need[ed] for the effective performance of the[] [union's] . . . responsibilities.").

Once again, both the reasons for precluding legally-mandated individual access to collectively-negotiated employer-union grievance-arbitration systems and the reasons for giving wide deference to union decisions made regarding the prosecution of claims within that system were developed—and only have force—with regard to individual claims based upon rights derived from the collective agreement itself. Yet, to provide, as in the *Gilmer* situation, for individual employee access and control would fundamentally compromise the nature of collective bargaining agreement grievance-arbitration systems as part of the ongoing collective bargaining process, and would frustrate the purposes of the parties to the collective bargaining relationship in creating such systems. And, absent such an alteration the nature of the collectively bargained arbitration agreement goes far beyond the agreed substitution of an arbitral forum for a judicial forum that does not limit public law rights approved in *Gilmer*.

* * * *

The sum of the foregoing is that unions and employers have over the years devised collectively bargained grievance-arbitration systems well-adapted to enforcing and elaborating upon the collective and individual rights created through collective bargaining, and this Court has developed a set of legal principles designed to preserve the effectiveness of those systems.

As in this case, those processes are negotiated against an industrial relations background in which terms such such as "grievance" and "matters under dispute" refer to issues arising under the "system of industrial self-government" created by the express terms of the agreement and by the customs and practices that are treated as implied contractual terms. As in this case, the processes provided for are sometimes nothing more than a continuation of the negotiation process, with final decision committed to the parties to the agreement rather than to any form of neutral adjudication (the Seniority Board). *See* pp. 6-7, *supra*. As in this case, those processes ordinarily do not permit individual access to the arbitration process, and may or may not permit individual employee access to earlier stages of the grievance process (here the earlier stages are based on a negotiation model, with the union representative acting as co-decisionmaker). As in this case, those processes tend to provide extremely short deadlines for decisionmaking in order to fulfill the basic function of deterring industrial strife, and tend to prefer arbitrators with experience in the customs and practices of the particular industry or plant, since the function of the arbitrator is to draw upon those customs and practices in elucidating the private law system established by the collective bargaining agreement. And, as in this case, collec-

tive bargaining agreement grievance and arbitration procedures almost always provide for union control over the determination which grievances move forward in the process and how.

Those processes are not intended to provide for binding determinations of rights that do not derive from the collectively-negotiated agreement and are unsuited to such determinations. Nothing in *Gilmer* supports committing individual employees' public law rights to a system which does not assure individual access to the neutral adjudicatory forum and individual control over presentation of the case. And, as this Court has long recognized, adjusting the collective bargaining grievance-arbitration process to an individual rights model would so overburden the process as to sap its ability to serve the collective-bargaining related purposes it was designed to serve.

Since there is no basis whatever for reconsidering this Court's well-considered, often-reiterated understanding that "[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining" (*Barrentine*, 450 U.S at 737), that understanding and the *Gardner-Denver* rule it supports should be reaffirmed.[8]

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

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[8] We recognize that it is theoretically possible for a union and an employer to enter into a collective bargaining agreement which expressly provides for adjudication of statutory rights, and which expressly permits individual employee access to and control of that process. If such an agreement were negotiated, then the question might arise whether the union's representational authority extends to the modification of individual employee public law rights.

This Court's precedents indicate, we believe, that the union's representational authority does not extend that far. *Gardner-Denver*, 415 U.S. at 51; *Barrentine*, 450 U.S. at 731 n.4, 737-38. But there is no need to address here whether we are correct in that regard.

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